02-7781
Bronx Household v. Board of Education

MINER, Circuit Judge, dissenting:

Today, the Majority permits a public school building in the Bronx to be designated "Middle School 206B and The Bronx Household of Faith." For more than sixty years, the sovereign State of New York has not included religious worship services in the list of uses permitted in public school buildings. The Board of Education of the City of New York and Community School District No. 10 (collectively, the "School Board") have specifically excluded such usage. More than five years ago, in a case brought by the same parties as those before us today concerning the use of the same public school facilities, a panel of this court unanimously held that this longstanding legislative policy did not violate the Free Speech Clause of the First Amendment. Review of our decision was sought in the Supreme Court, and that request for review was denied. In concluding that Plaintiffs have a clear or substantial likelihood of succeeding on the merits of their First Amendment claim, the Majority thwarts the will of the people of the State and City of New York to regulate a sphere of public life that has been traditionally left to state and local democratically elected bodies, as well as casts aside a binding precedent of this court. The sole justification offered by the Majority for these actions is that facts from the rather undeveloped record in the case before us parallel those in a Supreme Court decision involving religious instruction. Because I believe that, on the record before us, such a parallel does not exist, I respectfully dissent.

I.

A.

Section 414, subdivision 1 of the Education Law of the State of New York, duly adopted by the New York Legislature and approved by the Governor, provides, in relevant part, that "[s]choolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the Trustees or board of education of the district." N.Y. Educ. Law § 414(1) (McKinney 2002). The statute confers upon boards of education the authority to promulgate reasonable regulations for the use of the

schoolhouses within their school districts, subject to review on appeal to the Commissioner of Education. Id. Subject to the regulations adopted, a board of education may,

> permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:
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> > (a) For the purpose of instruction in any branch of education, learning or the arts.
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> > (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
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> > (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
> >
> > (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.
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> > (e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.
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> > (f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of

> education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.
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> (g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.
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> (h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.
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> (i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district, and, if there is further additional space available, the Cobleskill-Richmondville school district shall provide child care services for children ages three and four who need child care assistance due to lack of sufficient child care spaces. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.
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> (j) For graduation exercises held by non-for-profit elementary and secondary schools, provided that no religious service is performed.

Id.

As is apparent from the foregoing, there is no provision in New York law for the use of public schoolhouses for purposes of religious worship. (Nor is there provision for partisan political meetings and various other purposes.) Moreover, it is of note that, where admission fees are charged for uses that are ordinarily permitted, such as entertainments, meetings and similar occasions, such uses are barred where the "proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination." Id. § 414(1)(d). It is the clear policy of the State of New York to bar religious activities from the public schools to the greatest extent possible. In furtherance of the New York policy, and in accordance with the authority conferred to promulgate regulations that "conform to the purposes and intent" of the statute relating to the uses of schoolhouses and grounds, the Board of Education of the City of New York has adopted the following regulation:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

New York City Board of Education, Standard Operating Procedures § 5.11 (formerly § 5.9).

The "religious viewpoint" language in the second sentence of § 5.11 is an exception obviously derived from Supreme Court precedent. This precedent was summed up in the most recent Supreme Court pronouncement on the use of school property for religious speech:

> [W]e reaffirm our holding in Lamb's Chapel [v. Center Moriches Union Free School District, 508 U.S. 384 (1993),] and Rosenberger [v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995),] that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that [the school district's] exclusion of the [Good News] Club[, an evangelical Christian organization for children ages six to twelve] from use of [a public school] pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001).

B.

The linchpin of the Majority's conclusion that the policies described above violate the Free Speech Clause is its conclusion that "[o]n these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." The facts relied on by the Majority are taken from a self-serving letter written by Bronx Household of Faith co-Pastors Robert Hall and Jack Roberts requesting the use of Middle School ("M.S.") 206B and a self-serving affidavit submitted by Pastor Hall after his deposition was taken in this case. Both documents – probably written with the assistance of counsel[1] – tellingly decline to mention the church's intent to use M.S. 206B for worship services and instead attempt to persuade the reader that the church's proposed use of the public school involves instruction from a "religious viewpoint." While the Majority sees through this ruse by correctly observing that "plaintiffs were, in substance, renewing their prior request to conduct

[1] The letter was copied to counsel.

activities that included a weekly worship service," the Majority declines to focus on the undisputed facts elicited during Pastor Hall's deposition that put to rest any doubts about whether the church's proposed meetings are anything but religious worship services.

According to Pastor Hall, the reason why the Bronx Household of Faith requested to use M.S. 206B on Sundays between the hours of 10 a.m. and 2 p.m. was that this was the regular weekly time when it held its religious worship services. These services are held on Sundays because that day is "the Christian day of worship." The purpose of these meetings is to "engage in singing of Christian songs and psalms, to pray, to do Bible preaching and to do fellowship with other church members." The service is led by one of four men, two of whom are pastors, but the "preaching is done primarily" by the two pastors.

The service, which is preceded by an hour of Sunday school, begins at approximately 11 a.m. and lasts for about two hours. The meeting usually "opens with a prayer," which is typically followed by "a reading from a psalm," the singing of psalms, and a prayer from the congregation. Sometimes, personal testimonials are then made by members of the congregation about how the church helped them with a personal problem. Personal testimonials are followed by communion, which is "feeding a piece of bread that speaks to us of the body of Christ and drinking a cup of grape juice that speaks to us of the blood of Christ. It is the picture of the person and work of Christ." Only "members in good standing and those who feel that they are in good standing before the Lord, in their own consciences," and have been baptized may participate in communion. Following communion is "preaching of the word of God," then more singing, and then a coffee and bagel hour, where people frequently "engage in conversation and discussion and sometimes even counseling." Baptisms are performed on rare occasions. Finally, donations are collected by attendees placing money in a "non-descript gray [offering] box with a slit in the top of it."

The services are attended mostly by church members from the community, although they are open to all. Church membership is open to anyone who has been baptized, attends a

membership class and demonstrates that he "believe[s] in the basic historic[al] Christian gospel." There are currently approximately forty-seven members of the Church, and attendance at Sunday services ranges from 85 to 100 people. If the Church were permitted to use M.S. 206 for its Sunday services, it would use "a flyer to tell people where [to] meet."

At his deposition, Pastor Hall defined "worship services" as "ascrib[ing] worth, our supreme worth, to Jesus Christ." He distinguished the church from traditional clubs because it "engage[s] in the teaching and preaching of the word of God[, and it] administer[s] the sacraments of baptism and the Lord's supper." Thus, he also said that the church is not composed of "a group of people who have a common interest in the same way that stamp collecting and coin collecting bring people together." Indeed, Pastor Hall stated his belief that the church differs from a Bible study club or group because the latter groups do not "administer the sacraments of baptism and the Lord's supper." Finally, Pastor Hall noted that the church attaches no religious significance to a structure called a "church." Thus, it does not "build churches"; it builds "meeting houses." Therefore, anywhere the congregation of the Bronx Household of Faith meets for Sunday services is, in the church's view, a church.

II.

I agree with the Majority's statement that, to prevail on their request for a mandatory preliminary injunction seeking to "stay government action taken in the public interest pursuant to a statutory or regulatory scheme," Plaintiffs must show a "clear" or "substantial" likelihood of success on their First Amendment claim. For the reasons set forth below, I find not only that Plaintiffs have fallen far short of carrying this heavy burden but also that their attempt to do so is barred by the doctrines of stare decisis, res judicata and collateral estoppel.[2]

A.

As the Majority correctly observes, we are "tread[ing on] familiar ground." In Bronx

[2] Because I find that Plaintiffs have failed to carry their burden of showing a clear or substantial likelihood of success on the merits, I do not address whether the District Court abused its discretion in concluding that Plaintiffs have made out a showing of irreparable harm.

Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997) ("Bronx Household I"), the same Plaintiffs that are currently before us challenged the constitutionality of the School Board's denial of their request to hold religious worship services at M.S. 206B. After concluding that M.S. 206B was a "limited public forum,"[3] see id. at 212-14, we turned to the question of whether "'the distinctions drawn [by the School Board were] reasonable in light of the purpose served by the forum and [were] viewpoint neutral,'" id. at 211-12 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund Inc., 473 U.S. 788, 806 (1985)). We answered these questions in the affirmative, finding that it was reasonable "for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship" and that it was "reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church." Bronx Household I, 127 F.3d at 214. With respect to viewpoint neutrality, we found that "the regulation in question specifically permit[ted] any and all speech from a religious viewpoint" but that it did not "permit . . . religious worship services," which had never been permitted to be conducted at the school. Id.[4] Subsequent to our decision, certiorari was sought and denied. See 523 U.S. 1074 (1998).

B.

Our decision in Bronx Household I thus presents Plaintiffs with several obstacles to overcome in making their showing of a clear or substantial likelihood of success on the merits of their First Amendment claim. First, Plaintiffs face the doctrine of stare decisis. "A decision of a panel of this [c]ourt is binding unless and until it is overruled by the [c]ourt en banc or by the Supreme Court." Jones v. Coughlin, 45 F.3d 677, 679 (2d Cir. 1995). Second, Plaintiffs must overcome the additional hurdles of res judicata and collateral estoppel. A claim bought in a

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[3] There seems to be no serious question that M.S. 206B is a limited public forum. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829-30 (1995).

[4] We also rejected (over Judge Cabranes' partial dissent) Plaintiffs' constitutional attack against the School Board's prohibition of religious instruction. As discussed below, this part of our decision was overruled by the Supreme Court's decision in Good News Club.

subsequent proceeding is barred by the doctrine of res judicata if (i) the prior action involved an adjudication on the merits, (ii) the prior action involved the same parties or their privies and (iii) the claims asserted in the subsequent action were (or could have been) raised in the prior action, and by the doctrine of collateral estoppel if (a) the issues in both proceedings were identical, (b) the issue in the prior proceeding was actually litigated and actually decided, (c) there was a full and fair opportunity to litigate in the prior proceedings and (d) the issue previously litigated was necessary to support a valid and final judgment on the merits. Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998). To overcome these hurdles, Plaintiffs rely on Good News Club – a case decided by the Supreme Court more than three years after our decision in Bronx Household I – which Plaintiffs argue effectively overruled Bronx Household I.

In Good News Club, a divided panel of this court rejected a Bible club's challenge brought under the Free Speech Clause to a school district's policy prohibiting the club from holding weekly meetings on school premises after hours, where the activities conducted at the meetings included singing hymns, prayer, memorizing scripture and Bible lessons. See 202 F.3d 502 (2d Cir. 2000), rev'd, 533 U.S. 89 (2001). While never characterizing these activities as religious worship services, my opinion for the majority found that it was constitutionally legitimate for the school district to draw a distinction between discussing secular subjects from a religious viewpoint and religious instruction. These activities, we held, did "not involve merely a religious perspective on the secular subject of morality." Good News Club, 202 F.3d at 510. Rather, they offered "children the opportunity to pray with adults, to recite biblical verse, and to declare themselves 'saved.'" Id.

Accepting that "these practices [were] necessary because [the Bible club's] viewpoint [was] that a relationship with God [was] necessary to make moral values meaningful," we nevertheless concluded that it was "clear from the conduct of the meetings that the [Bible club] [went] far beyond merely stating its viewpoint." Id. Instead, it was "focused on teaching children how to cultivate their relationship with God through Jesus Christ," and thus under,

"even the most restrictive and archaic definitions of religion, such subject matter [was] quintessentially religious." Id. Indeed, while characterizing the Bible club's activities as religious instruction instead of religious worship, we found it "difficult to see how the . . . activities differ[ed] materially from" religious worship, for "each ha[d] prayers and devotional songs; each ha[d] a central sermon or story with a message; each ha[d] a portion in which attendees [were] called upon to be 'saved.'" Id. Accordingly, because "[a]pplying a different label to the same activities d[id] not change their nature or import," id., we found the school board's restrictions to be permissible content-based restrictions rather than impermissible viewpoint-based restrictions. Id. at 511.

Judge Jacobs dissented, although he characterized his agreement with the majority as being "substantial." Id. (Jacobs, J., dissenting). Significantly, Judge Jacobs' view that the Bible club's "message [was] in fact the teach[ing of] morals from a religious perspective" was based on the fact that its "focus appear[ed] to be on teaching lessons for the living of a morally fit life, and not on worship." Id. at 515 (internal quotation marks omitted and emphasis added).

The Supreme Court granted certiorari in Good New Club and reversed, rejecting the notion that "something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." 533 U.S. 98, 111 (2001). What mattered for purposes of the Free Speech Clause, the Court stated, was that there was "no logical difference in kind between the invocation of Christianity by the [Bible club] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." Id. Thus, the Court rejected the notion that "any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues." Id. "[R]eliance on Christian principles," the Court continued, did not "taint[] moral and character instruction in a way that other foundations for thought or viewpoints do not." Id. Rather, the Court "reaffirm[ed]" the principle "that speech discussing otherwise permissible subjects cannot be excluded from a

limited public forum on the ground that the subject is discussed from a religious viewpoint." Id. at 111-12. Thus, the Court concluded that the school district's exclusion of the Bible club from using the school to provide religious instruction constituted impermissible viewpoint discrimination. Id. at 112.[5]

C.

Our holding in Bronx Household I that religious worship services could be prohibited from being held in public school buildings without running afoul of the Free Speech Clause remains good law, notwithstanding the Supreme Court's holding in Good News Club that constitutionally meaningful distinctions could not be drawn between religious and secular viewpoints in the context of religious instruction conducted in those same school buildings.[6] The Majority recognizes as much when it seeks to distance itself from the District Court's determinations that "religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts." As the Majority correctly observes, these determinations "are in

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[5] I here note my understanding of the hierarchical nature of the Federal Court System and the need to follow Supreme Court precedent where it can be ascertained. I say this because the Supreme Court found my failure, as author of the subsequently reversed Lamb's Chapel case in our court, see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), rev'd, 508 U.S. 384 (1993), to cite Lamb's Chapel in the opinion for our court in Good News Club, to be "particularly incredible." 533 U.S. at 109 n.3. I was quite aware of the Lamb's Chapel case and cited it extensively in Bronx Household I, which was in turn cited extensively in our court's Good News Club opinion. It seemed to me then that Lamb's Chapel just did not govern the evangelical activities described in Good News Club. The Supreme Court majority did find a similarity, and that is the law of the land, right or wrong.

[6] The Majority seems to suggest that the vacatur and remand by the Supreme Court of the Fifth Circuit's decision in Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000), vacated and remanded, 533 U.S. 913 (2001), in light of Good News Club somehow demonstrates that the Court rejected our holding in Bronx Household I concerning religious worship services in public schools. But, in taking such action, the Court did not express its views on the merits of the Fifth Circuit's decision. In fact, the Court's decision to vacate and remand a lower court's decision in light of a recently decided case does not necessarily mean that the lower court's decision was incorrectly decided. Indeed, in several such cases, the Court has later declined to review the case notwithstanding the fact that the lower court did not change its conclusion on remand. See, e.g., Carter v. Johnson, 131 F.3d 452 (5th Cir. 1997), cert. denied, 523 U.S. 1099 (1998); Stutson v. United States, 128 F.3d 733 (11th Cir. 1997) (mem.), cert. denied, 522 U.S. 1135 (1998).

obvious tension with our previous holding that a permissible distinction may be drawn between religious worship and other forms of speech from a religious viewpoint . . . a proposition that was . . . not explicitly rejected in Good News Club." Thus, the Majority appears to concede that, if the activities conducted at Bronx Household of Faith meetings are inherently religious worship and nothing else, our decision in Bronx Household I would govern and this action would be dismissed on the grounds of res judicata and collateral estoppel.

In reaching its conclusion that Plaintiffs have shown a substantial or clear likelihood that they will succeed on the merits of their Free Speech Clause claim, the Majority finds "no principled basis upon which to distinguish the activities set out by the Supreme Court in Good News Club from the activities that [Plaintiffs have] proposed for its Sunday meetings at [M.S.] 206B." In particular, the Majority concludes that these activities do not "constitute only religious worship, separate and apart from any teaching of moral values." For the reasons set forth below, I do not believe that such a conclusion can be supported on the present record. Indeed, my view of the record is that it supports the exact opposite conclusion.

Even though the Supreme Court's analysis in Good News Club was confined to religious instruction rather than religious worship services, the Majority attempts to extrapolate that analysis to the case at bar based on the Court's response to the characterization of the facts in Good News Club by Justice Souter in his dissenting opinion. In particular, Justice Souter opined that the Bible club "intend[ed] to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion." Good News Club, 533 U.S. at 138 (Souter, J., dissenting).

The specific facts to which Justice Souter alluded were that the Bible club's meetings began and ended with a prayer and that "at the heart of the meeting" was the "'challenge' and 'invitation,'" which were "repeated at various times throughout the lesson" and which involved "saved children" being "challenged to stop and ask God for the strength and the want . . . to obey

Him" and "unsaved children" being "invite[d] . . . to trust the Lord Jesus to be [their] Savior from sin, and receiv[e] [him] as [their] Savior from sin." Id. at 137-38 (internal quotation marks omitted). The Good News Club majority responded to Justice Souter in a footnote by characterizing his "recitation of the [Bible club's] activities" as "accurate," but it declined to characterize the Bible club's activities as "mere religious worship, divorced from any teaching of moral values." Id. at 112 n.4. What mattered, according to the Good News Club majority, was that the substance of the Bible club's activities involved conveying ideas from a religious viewpoint. Id.

Based on the interchange between Justice Souter and his colleagues, the Majority concludes that the "factual parallels between the activities described in Good News Club and the activities at issue" here justify its conclusion that there is a substantial or clear likelihood that Plaintiffs will prevail in showing that the School Board's prohibition against religious worship services in public schools constitutes viewpoint discrimination. To quote from Justice Souter's dissent in Good News Club, the activities at issue here make this case as different from Good News Club "as day from night." Id. at 137 (Souter, J., dissenting).

Here, the "meeting" is led by a member of the clergy, who leads the attendees (largely made up of members of the church's congregation) in prayer and the singing of psalms, administers Communion only to those who have been baptized, delivers a sermon from the pulpit and collects a religious offering from those present. To say that these activities are no different from secular meetings (such as a scouts meeting) where people eat, drink, sing, learn, socialize and engage in certain "rituals" like saluting the flag is to blink reality. As Judge Cabranes observed in Bronx Household I:

> Unlike religious "instruction," there is no real secular analogue to religious "services," such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism. Indeed, the dictionary definition of the term "services" in this context suggests as much: "a) public worship b) any religious ceremony. . . ." Because "services" are by definition religious in nature, it does not appear that they could ordinarily be understood to serve as a vehicle for both religious and secular viewpoints."

127 F.3d at 221 (Cabranes, J., concurring in part and dissenting in part) (quoting Webster's New World Dictionary 1226 (1994)); see also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-07 & n.19 (2000) (in holding that student-led prayer at public school athletic events violated Establishment Clause, Court relied on definition of "invocation" in Webster's Third New International Dictionary, which defined the term to mean "a prayer of entreaty that is usual[ly] a call for the divine presence and is offered at the beginning of a meeting or service of worship"). Indeed, in the context of the Free Exercise Clause, the Supreme Court has held that worship services constitute the exercise of religion in pure form. See Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("'[T]he exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").

I have no quarrel with the findings of the Majority that the School Board has authorized other groups, like the Boy Scouts and Girl Scouts, to teach morals and character development on school premises, that the School Board permits social, civic and other uses pertaining to the welfare of the community, and that therefore organizations or activities that undertake and promote speech from a religious viewpoint cannot be barred from school property. But I cannot abide the Majority's leap of logic that, based on Plaintiffs' self-serving statements that their "teaching comes from the viewpoint of the Bible" and their emphasis on the social and community aspects of the "meetings" of the church, their religious worship services are suddenly transformed into speech from a religious viewpoint. To do so would be no different from upholding the admissibility of a criminal defendant's confession made in the absence of a Miranda warning based solely upon the self-serving statements of the police that the defendant was not the subject of a custodial interrogation.

At bottom, based on the limited record before us, I find that the activities engaged in by

Plaintiffs are religious worship services – nothing more and nothing less.[7] Accordingly, Plaintiffs have not met their burden of showing a clear or substantial likelihood that they will succeed on the merits of their Free Speech Clause claim, given our holding concerning religious worship in Bronx Household of Faith I and the Supreme Court's failure to disturb that holding in Good News Club. Consequently, I find that the District Court abused its discretion in concluding otherwise.

D.

Even if I found that the District Court did not abuse its discretion in determining that Plaintiffs had shown a likelihood of success on their Free Speech Clause Claim, I would still disagree with the Majority's conclusion that the School Board has not succeeded in demonstrating a likelihood that its prohibition against religious worship services being conducted in public schools was necessary to avoid a violation of the Establishment Clause. It cannot be gainsaid that a state has an interest in avoiding an Establishment Clause violation. See Widmar v. Vincent, 454 U.S. 263, 271 (1981) (allowing use of university open forum for worship but noting "that the interest of the University in complying with its constitutional obligations may be characterized as compelling"). In concluding that there would be no Establishment Clause violation if Plaintiffs were permitted to hold religious worship services at M.S. 206B, the Majority again relies heavily on the Supreme Court's Good News Club decision. There, the Court rejected the school district's Establishment Clause defense to its ban on religious instruction in public school buildings. As the Majority correctly observes, in doing so, the Court emphasized that the religious instruction "was held after school hours, [was] not sponsored by the school, and [was] open to all students who obtained parental consent."

Once again, I believe the Majority misses the mark. In Good News Club, the Court concluded that the risk was low that the school district would be perceived as endorsing religion

[7] See Oxford English Dictionary 577 (2d ed. 1989) (definition 8(a) of "worship": "Reverence or veneration paid to a being or power regarded as supernatural or divine; the action or practice of displaying this by appropriate acts, rites, or ceremonies").

because a Bible club was one of many clubs that met at the school building to discuss its views. There was no significance to when the club wanted to hold its meetings. Here, of course, Plaintiffs have made it quite clear that they want to hold their religious worship services at M.S. 206B every Sunday morning because Sunday is "the Christian day of worship." Moreover, Plaintiffs have also made it clear that they will use flyers to advertise the fact that their religious services will be held on Sunday mornings at M.S. 206B and that they regard M.S. 206B as a "church" based on the fact that the school is where they are holding their services. Surely it cannot be gainsaid that there is a substantial risk that the School Board will be perceived as endorsing religion if flyers begin appearing in the neighborhood advertising that Bronx Household of Faith religious worship services will be held every Sunday morning at the group's new "church" located at M.S. 206B. See Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 75 (2d Cir.), cert. denied, 534 U.S. 827 (2001).

In addition to the above concerns relating to the perceived endorsement of religion by the School Board, I am also concerned that Plaintiffs' proposed activities will create significant risks of entanglement between the School Board and religious groups.[8] The School Board's first-come-first-serve policy of assigning space in public schools to groups that request it may work fine when the users are largely ambivalent about which day or night of the week they can be allocated space. But what will happen when other churches, synagogues and mosques in New York City follow Plaintiffs' lead and request use of school facilities during specific and limited time periods when these groups are required by their religions to worship and the supply of space is not sufficient to accommodate the demand? The quantity and quality of entanglement between school officials and religious groups in these circumstances goes well beyond what was involved in Good News Club. Accordingly, the use of a publicly financed building for private religious

[8] That the Majority shares this concern is demonstrated by the cataloging of issues "unresolved" by the Supreme Court and found in Part IV.A of the Majority Opinion. These issues speak to the need to adhere to our precedent until the Supreme Court speaks.

worship services, prohibited in New York through the democratic process,[9] simply runs afoul of the Establishment Clause.

III.

I end with a response to the historical justifications for the Church-State merger accomplished in this case advanced by the Becket Fund for Religious Liberty in its amicus brief.[10] The Becket Fund apparently invokes the shade of Thomas Jefferson in its brief to justify the use of public buildings for church services because Jefferson is said to have attended services in the hall of the House of Representatives. As the author of the Virginia Statute of Religious Freedom, a strong supporter of popular sovereignty and states' rights, including the rights of nullification and secession, a critic of the Supreme Court's assumption of the power to declare state laws unconstitutional, and an Atheist (at least so considered by some), Jefferson lends little support to the position taken by the Becket Fund in this case.[11] Indeed, given that during Jefferson's lifetime the First Amendment applied only to the federal government and not the states, it seems strange to suggest that Jefferson would have countenanced (1) a federal court declaring unconstitutional a policy, (2) adopted pursuant to a state statute, (3) prohibiting

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[9] In a dispatch to the New York Times earlier this year, it was reported that a Justice of the Supreme Court gave a speech in which he noted, as is his wont, that the constitutional separation of church and state has not been correctly interpreted by his Court or by the lower courts. In response to a sign saying: "Get religion out of our government," carried by a demonstrator during the speech, the Justice is reported to have remarked: "I have no problem with that philosophy being adopted democratically." See N.Y. Times, Jan. 13, 2003, at A19. The exclusion of religious worship services from New York public school buildings was adopted democratically.

[10] Amicus briefs were also filed on behalf of the New York State School Boards Association, Inc. and the United Federation of Teachers, as well as by the United States. It is surprising that the United States has taken the unusual position of filing an amicus brief supporting Plaintiffs in this court, especially given the current administration's policies favoring state and local control over education and its aversion to "activist federal judges" who seek to substitute their judgment in the place of democratically elected state and local policymakers.

[11] See, e.g., Noble E. Cunningham, Jr., In Pursuit of Reason: The Life of Thomas Jefferson 55-58, 164-67, 217-19, 225 (1987); Stanley Elkins & Eric McKitrick, The Age of Federalism: The Early American Republic, 1788-1800 at 197, 719-21 (1993); James F. Simon, What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States 21, 58-61, 285-88 (2002).

worship services from being conducted on public school property.[12]

Absent from the Becket Fund's amicus brief is any recognition of the unbroken tradition of federal court deference in constitutional cases to democratically elected state and local governments in matters concerning education. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (same).[13] It has been said that

> [i]n pioneer times and during the era of the one-room country schoolhouse, before automobile transportation became commonly available, it probably was not at all unusual, in many rural and village areas, for the residents of the neighborhood to use the public schoolhouse as a meeting place for many community nonschool purposes, during nonschool time[, including] for holding Sunday church services or Sunday school meetings, or for evangelical or other religious meetings in the evenings, often because it was the only available building or hall in the community which could accommodate such a gathering.

C.T. Foster, Annotation, Use of Public School Premises for Religious Purposes During Nonschool Time, 79 A.L.R.2d 1148, 1150 (1961). However, such use was subject to a critical condition: that the "utilization of the public schoolhouse as a meeting place for religious services, outside of school time, where permitted by school authorities, generally was allowed pursuant to common consent of the inhabitants of the region." Id. (emphasis added) Here, the inhabitants of

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[12] As for the attendance of John Quincy Adams at church services in the Supreme Court chambers, also invoked in the Becket Fund's amicus brief, suffice it to say that, like the hall of the House of Representatives, (1) no legislation excluded chambers from being used for services; (2) chambers was not a facility devoted to the public education of children, even in the time of John Quincy Adams; and (3) the period of use is unknown. Considering the present direction of Supreme Court decisions in the area of church-state separation, however, see, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002), we may once again see church services conducted in the Supreme Court courtroom.

[13] See also Missouri v. Jenkins, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) ("We have long recognized that education is primarily a concern of local authorities. . . . Federal courts do not possess the capabilities of state and local school officials in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution."); United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("It is well established that education is a traditional concern of the states.").

the State of New York have for decades withheld such consent.[14] Indeed, the fact that the policy in question here has been an affirmative policy of the State of New York for almost three quarters of a century also militates in favor of its constitutionality. See Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("Yet an unbroken practice of according [a tax] exemption to churches openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." (emphasis added)).

IV.

I believe that Plaintiffs' claims are barred by collateral estoppel and res judicata, as well as stare decisis. I therefore disagree with my colleagues that Plaintiffs have made a clear or substantial showing of a likelihood of success on the merits. Accordingly, I would vacate the preliminary injunction and remand the case to the District Court with instructions to enter a judgment dismissing the action with prejudice.

[14] Moreover, the present-day availability of meeting places is much greater than it was in pioneer days.